TOH SEAK KENG

v.

LIM HUANG CHEOW & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D4-22-295-86]
24 APRIL 1992

CIVIL PROCEDURE: *Consent order - Not perfected - Parties under mistaken belief as to dates - Shares disposed before expiry of time - Contempt - Interlocutory order - Was the intervener an innocent party.*

On 20 April 1990, the Supreme Court held that the respondents are to return certain shares to the interveners upon payment of an agreed price. However the interveners could not raise the said amount. On 14 August 1990, consent order was entered into granting the interveners 7 days to raise RM475,000. However before the order could be perfected the interveners applied to vary the order to grant them 30 days to come out with the money. However on 22 August 1990, the respondents had transferred the shares to 3rd parties. Both parties were under the belief that 7 days expired on 21 August 1990. The interveners realised that because of O. 3 r. 2(5) RHC they had infact further 2 days from 21 August 1992 to pay up RM475,000. The interveners moved the Court in contempt against the respondents for dealing with the shares on the 8th day as they had done. They also sought a declaration that because the respondents had disposed of the shares before they were entitled to do so the time for the interveners to come up with the money was suspended.

Held:

[1] The right to a discharge on repudiation by one party is based on the principle of the other party being the innocent party. However where the party in fact is unable or unwilling to carry out his part of the bargain it cannot be said that he is the innocent party.

[Interveners' applications dismissed with costs.]

Cases referred to:

Ganapathy Chelliah v. Lum Kum Chun & Ors. [1981] 2 MLJ 145 ***(cit)***
Australasian Automatic Weighing Machine Co. v. Walter [1891] WM 170 ***(cit)***
Ooi Siew Yook & Ors. v. Lim Bar Kee [1987] CLJ (Rep) 814 ***(cit)***
Purcell v. F.C. Trigell Ltd. & Anor. [1971] 1 QB 358 ***(cit)***
Dietz v. Lenning Chemicals Ltd. [1966] 2 All ER 962 ***(foll)***
Mullins v. Howell [1879] 11 Ch D 763 ***(foll)***
Foran v. Wight [1989] ALJR 1 ***(foll)***

Legislation referred to:

Rules of the High Court, O. 3 r. 2(5)

For the interveners/applicants - Ranjit Singh; M/s. Cheang & Ariff
For the respondent - Derek Fernandez, (S. Selvarajah with him); M/s. Fernandez & Co.

JUDGMENT

VC George J:

The Supreme Court had held that the consent order obtained in respect of the sale of certain shares, the registered owners of which were the interveners, was not binding on them. The shares were to be returned by the respondents to the interveners upon payment to the respondents of the agreed value of the shares.

The order of the Supreme Court was made on 20 April 1990. The respondents through their solicitors wrote to the interveners' solicitors requiring them to pay up the said value of the shares so that the shares could be delivered to the interveners. However the interveners apparently appeared to have had some difficulty in raising the amount which was some RM475,000. Apparently as an excuse for not coming out with the money they appeared to seek refuge behind the fact that the Supreme Court order had not been perfected. The respondents wanted the issue resolved for obvious reasons - if the interveners in fact did not want the shares or could not pay for them then they, the respondents, would be stuck with the shares. They did not want the issue left hanging over their heads. They wanted to know whether they could deal with the shares as they pleased. They wanted a dateline.

They filed their application encl. (29) in effect asking for an order that the RM475,000 be paid within 7 days failing which the respondents to be at liberty to deal with the shares as they deem fit. When the application came up the interveners were represented by Counsel and a consent order was entered in terms of the application. This was on 14 August 1990.

Apparently a draft order was sent for the approval of the solicitors for the interveners who duly approved it. However before it could be perfected the interveners' solicitors on 22 August 1990 took out their application encl. (32) seeking a variation of the consent order so as to give the interveners a further 30 days or so to come out with the money. At that stage the interveners had not realised that on 22 August 1990, the respondents had in fact transferred the shares to 3rd parties. They did this in the belief that the 7 days given for the interveners to pay up the RM475,000 had expired on 21 August 1990. It is also an admitted fact that the interveners and their legal advisers themselves were at that stage also of the opinion that the 7 days had expired.

On or about 26 September 1990, the interveners and their solicitors realised that because of O. 3 r. 2(5) RHC, the interveners had in fact a further 2 days from 21 August 1990 to pay up and that the assumption that the time given by the consent order had expired was erroneous. Confirmation of this to be the position was obtained by the Court ruling that although the order had provided for the interveners to pay up "within 7 days", in effect they had 9 days. However the position that was obtained on the 8th day after the order was, that both parties were under the impression that the time was up. As had been seen, accordingly the respondents purported to transfer away the shares thinking that they had the liberty to do so and the interveners, although they believed they were already out of time sought by encl. (32) to have the time expanded.

As soon as the interveners and/or their solicitors realised the error, they made some interesting moves. They moved the Court in contempt against the respondents for dealing with the shares on the 8th day as they had done. They also filed encl. (53) by which they sought a declaration that because the respondents had disposed of the shares before they were entitled to do so the time for the interveners to come up with the money was suspended. They also sought the consequential order that the Court fix a new date for the payment of the RM475,000.

Enclosures (53) and (32) came on together. I saw them as being in effect alternative prayers, *viz*: would the Court declare that there was a suspension of time and if not would the Court in any event vary the consent order by extending the time to pay up. En. Ranjit Singh sought to make something of the fact that the order had not been drawn up. He argued that particularly as it had not been perfected, it was open to the Court to reconsider it and vary it.

I do not think in the context that the "not perfected order" point has merits in that both parties had acted as if the order had heen perfected. It is not open to the interveners on the one hand to say that there had been a breach of the terms of the order as they do by encl. (53) and on the other hand to call to aid the fact that it had not been perfected - I think that an estoppel of sorts arises to preclude the interveners from doing so.

Since the order made was a consent order the general rule is that it may be varied only by consent of the parties - See: *Ganapathy Chelliah v. Lum Kum Chun & Ors.* [1981] 2 MLJ 145 where *Australasian Automatic Weighing Machine Co. v. Walter* [1891] WM 170 was applied. However there are exceptions to the general rule, the Courts having reserved to themselves a measure of control over its own orders, even consent orders. The Court may in its discretion vary or alter interlocutory orders even though made originally by consent - See: *Ooi Siew Yook & Ors. v. Lim Bar Kee* [1987] CLJ (Rep) 814 where Edgar Joseph Jr. J found assistance in a passage in the judgment of Denning MR in *Purcell v. F.C. Trigell Ltd. & Anor.* [1971] 1 QB 358, 363, 364 where the order had not been drawn up. The position had been restated by Denning MR in *Dietz v. Lenning Chemicals Ltd.* [1966] 2 All ER 962, 964:

> The law is settled by a series of cases, particularly *Holt v. Jesse* and *Harvey v. Croydon Union Rural Sanitary Authority*. They show that if, before a consent order is drawn up, it appears that the consent was given under a misapprehension or from a misstatement or want of materials, then the party can come to the Court and ask that it be not drawn up. Of course, he cannot come without good reason. If he seeks arbitrarily to get out of it, the Court will not listen to him; but, if he has any good reason, then he can come and ask that it should not be made an order of the Court, and that it be set aside.

Jessel MR was of the opinion that at least in respect of interlocutory orders even if perfected the Court had the discretion to discharge them. He said in *Mullins v. Howell* [1879] 11 Ch D 763:

> I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications. ...I do not think that the rules which have been laid down as the rules under which the Court will enforce agreements apply to enforcing orders of the Court, because the Court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments...

In the instant case the interveners have failed to prove that the consent order was made under a mistake. The interveners also rely on anticipatory breach to ask the Court to hold that they were discharged. As has been seen, admittedly in all innocence (albeit somewhat hastily) the respondents, assuming (erroneously) that they were at liberty to do so, have appeared to have repudiated their obligation to be in possession of the shares so as to have them available to be transferred on completion in that they had in fact transferred the shares to a 3rd party one day before they were at liberty to have done so.

In the judgment of the High Court of Australia in *Foran v. Wight* [1989] ALJR 1, 30 Dawson J said:

> The reason why it is said that the purchasers were not entitled to rely upon the vendors' representation is that they, the purchasers, were not ready and willing to perform their obligations because they did not then have the finance to enable them to do so. Of course, the date for settlement had not arrived at the time the vendors repudiated the contract and, as will appear, it is necessary to consider the purchasers' obligation at that time with that fact in mind. But I shall return to that aspect of the matter shortly. Firstly it is necessary to

settle the question whether the purchasers were under any obligation to prove, as plaintiffs, that, notwithstanding the vendors' repudiation, they were ready and willing to perform their obligations under the contract. Of course, readiness and willingness implies not only disposition, but also capacity: *De Medina v. Norman* [1842] 9 M & W 820 at 827 [152 ER 347 at 350].

In any action for breach of contract, the readiness and willingness of the plaintiff to perform those mutual obligations remaining to be performed on his part under the contract is a condition precedent to his right to recover: see *Hensley v. Reschke* [1914] 18 CLR 452. Under the old rules a plaintiff was required to plead that he was ready and willing but under the present rules that fact is implied with the effect that he is not required to prove it unless the defendant puts it in issue. In that event the burden of proving readiness and willingness rests upon the plaintiff: see Supreme Court Rules 1970 (NSW) Pt 15, r. 11.

But what if the breach is anticipatory rather than actual. The authorities have given conflicting answers to this question, but it is now clear that in cases of repudiation as well as actual breach, readiness and willingness on the part of the plaintiff is part of his cause of action. The position was clearly stated in *DTR Nomineees Pty. Ltd. v. Mona Homes Pty. Ltd.* at 433:

> A party in order to be entitled to rescind for anticipatory breach must at the time of rescission himself be willing to perform the contract on its proper interpretation. Otherwise he is not an innocent party, the common description of a party entitled to rescind for anticipatory breach.

Here the respondents admittedly were not in a position to say and do not say that at the relevant times they were or would have been capable of and ready and willing to perform their obligations under the terms of the consent order. The right to a discharge on repudiation by one party is based on the principle of the other party being the innocent party. However where that party in fact is unable or unwilling to carry out his part of the bargain it cannot be said that he is the innocent party. Dawson J goes on in *Foran v. Wight* at p. 30 of the report to say that one should not...

> ...carry too far the principle that the repudiation by one party of a contract may absolve the other party from the obligation of rendering useless performance. No doubt that principle, when it applies, may reduce the extent, or later the nature, of the readiness and willingness which a plaintiff is required to show, but there is no reason why it should eliminate the requirement entirely. A party should not be able to sue for breach if he is unable or unwilling to carry out his part of the bargain; where, in other words, he is not the innocent party. Even where a party has been absolved by the repudiating party from performing his future obligations under the contract he must show that at the time of the repudiation he was ready and willing to complete the contract had it not been repudiated.

Both the applications encls. (32) and (53) have to be and are dismissed with costs.

Also found at [1992] 3 CLJ 1650